[Filed 8-14-08]

IN THE IOWA DISTRICT COURT FOR LYON COUNTY

STATE OF IOWA, *ex rel.*, IOWA DEPARTMENT OF NATURAL RESOURCES (99AG23542) *Plaintiff,* v. **HAROLD DeVOS and SHARON DeVOS,** *Defendants.*	**NO. LACV-014492** **POST-TRIAL RULING ON CIVIL PENALTIES**

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CLERK OF DISTRICT COURT
LYON COUNTY, IOWA

On May 22nd 2008 this matter came before trial on the sole issue of civil penalties. The State of Iowa, Department of Natural Resources ("State" or "DNR") was represented by Assistant Attorney General David Dorff, while the Defendants, Harold and Sharon DeVos ("DeVos") appeared *pro se.* Previously the Court sustained the State's Motion for Partial Summary, finding the Defendants liable for violations of applicable air quality, storm water discharge and solid waste laws, and the Court takes judicial notice of the findings of fact and conclusions of law therein. (LACV-014492, September 24th 2008)(Whittenburg, J.).

CONCLUSIONS OF LAW

A) Jury Trial for Civil Penalties

A threshold matter for the Court, one raised during the damages phase of the trial, is whether the Defendants were entitled to a civil jury trial.[1] The Court concludes that the Defendants' late request for jury trial was properly denied. The United States Supreme Court, the arbiter of 7th Amendment conflicts, has determined that civil penalties are properly brought before a trial court. *Tull v. United States,* 481 U.S. 412 (1987); *accord* U.S. Const. Art. IV, cl. 2 (Supremacy Clause). The Court's reasoning, persuasive in the instant matter, explains that the right to a jury trial rests upon a traditional common-law right to a jury. *Id.* at 426. Since the imposition of civil penalties is not a "most fundamental element" of a trial by jury, civil penalties are properly before a trial court. *Id.* The Iowa Supreme Court has adopted this reasoning with respect to Article I, § 9 of the State constitution. *Pitcher v. Lakes Amusement Co.*, 236 N.W.2d

[1] The Court ruled from the bench that the DeVos' requests for court-appointed counsel were to be denied, as the private interests at stake did not involve incarceration, our Courts have not traditionally afforded counsel in civil matters, and the opportunity to appeal provides additional safeguards against errors in the Court's decision. *See e.g., Matthews v. Eldridge,* 424 U.S. 319 (1976) *and, State* ex rel. *Hamilton v. Snodgrass,* 325 N.W.2d 740 (Iowa 1982).

333 (Iowa 1975)(recognizing that persons are entitled to jury trials based on common law rights to a jury). Since there is no Federal or State guarantee of a jury trial for civil penalties, the Court properly denied the DeVos' request for trial by jury.

B) Standard for Assessing Violations.

There are three specific regulations at issue in the determination of an appropriate penalty for the Defendants. These are: violations of air quality, which permits the Court to assess an amount not exceeding $10,000 per day for violations of §455B.146; violations of water quality under §455B.191(1), subject to a maximum $5,000 per day penalty; and, solid waste violations under §455B.307(3), also permitting a $5,000 per day maximum penalty. There is no floor to what the Court may assess, but the statutory scheme imposes the above ceiling on any given infraction.

In assessing violations of the State's natural resource regulations, the DNR is permitted to undertake a range of remedial actions, including civil trial and administrative assessment of civil penalties. *See e.g.,* Iowa Admin. Code R. 567-10.2 *and* Iowa Code § 444B.109(2). There is scant case law on what permissible factors the Court is to use in assessing civil penalties. However, both the Iowa Code and the Administrative Code provide guidance in a six-factor test used in the administrative assessment of penalties. These factors are appropriate for consideration, and the State urges that they be used to guide this Court's determination of the DeVos' liability. Moreover, in what little case law exists with respect to DNR violations, those decisions have adopted the Code factors as well. *See e.g., Organic Technologies Corp. v. Iowa Dept. of Nat. Res.*, 609 N.W.2d 809, 820 (Iowa 2000).

In determining whether a violation may be appropriate for administrative assessment of penalties and in assessing such penalties, the DNR is to consider the following factors: (1) the costs saved or likely to be saved by the violator's noncompliance; (2) the gravity of the violation; (3) the degree of culpability of the violator; (4) the maximum penalty authorized for that particular violation under this chapter; (5) whether the assessment of administrative penalties appears to be the only or most appropriate way to deter future violations, either by the violator or by others similarly situated; and (6) other relevant factors that arise from the circumstances of the case. Iowa Code § 455B.109(1)(a)-(d); Iowa Admin. Code r. 567-10.2(1)-(6) *and Organic Technologies Corp. v. Iowa Dept. of Nat. Res.*, 609 N.W.2d 809, 820 (Iowa 2000).

I) Cost of Compliance

The.Court now applies these factors below to each of the Defendants' violations. The first factor is the cost saved or likely to be saved by the violator's noncompliance with environmental regulations. In this case, those savings were extensive. In order for the Defendants to have engaged in the business of demanufacturing appliances, several steps were required of them, and the process is a lengthy and expensive one. According to testimony of the State's witnesses, demanufacturing requires a license that is only remitted after the following: certification of proper zoning, registration of the proposed site with the EPA as an area handling PCBs (a known carcinogen), licensure from the EPA for refrigerant disposal and disposal equipment, a written plan for the site, a state storm water permit, and documentation of financial assurances. If the site plan is approved, the site then is inspected for proper storage of noxious substances, such as mercury, lead, PCBs and the like. Thereafter, two additional financial hurdles are presented to a party wishing to demanufacture appliances. The party must have a bond or other surety (the financial assurance documentation), and the applicant must hire an environmental engineer to inspect the site capacity for storage and the costs of associated clean up.

The State's experts suggest that the cost of the financial assurance is estimated at $10,000, while the engineering plan costs approximately $1500-$2000. The costs per appliance for proper disposal of refrigerants and mercury capacitors (both common in appliances) is estimated to be $10-$20 per appliance. According to the State's exhibits, at the time of the final inspection, the DeVos's had approximately 40-50 appliances that were not DNR-compliant on the premises. Applying the upper limits of the above estimates, which were unrefuted by the Defendants, the Court concludes that the savings realized by not paying for costs of compliance is approximately 50 appliances/$20 a piece; $2000 for site plan engineering; and $10,000 for financial assurances. All sum, the realized pecuniary benefit to the DeVos's was $13,000 for failure to comply with State environmental regulations.

II and III) Gravity and Culpability

The State argues that the Defendants' violations with respect to all three regulations were quite intentional, owing to the injunctive administrative order issued by the DNR on June 7th 2006. The Court's previous Order granting Partial Summary Judgment determined as much. The Defendants' have been assessed liability for the intentional violations of open burning of

potentially toxic substances on August 11th 2005 and September 15th 2006. The State posits that the gravity of burning these combustible and noxious materials in the appliances was an actual or potential threat to the public's health and safety, and there is no reason to contend otherwise, since mercury and PCBs are toxic and/or carcinogenic, and openly burning these materials is a patent threat to the public's well-being.

With respect to the waste water violations, the Defendants also intentionally neglected to obtain the proper permit, as well as to submit a pollution prevention plan. The DNR Administrative order issued on June 7th 2006 specifically required them to obtain this permit. However, as of the May 22nd 2008 date of this trial, the DeVosses had still failed to comply, some 700 days after being given actual notice of their noncompliance. The culpability of the Defendants is obvious. The gravity of the waste water violations, though serious, is deemed to not be as egregious as that of the open burning and solid waste violations.

As with the waste water violations, the Defendants failed to comply for 700 days with the DNR administrative order as to solid waste violations; and, they were in non-compliance at all times from June 7th 2006 until May 22nd 2008. This cannot be considered an oversight on the part of the Defendants. The State strongly asserts that the solid waste violations are the most serious of the DeVos' violations. According to the requested post-trial brief, the handling and disposal of the appliances damaged, cut and/or crushed compressors, capacitors and mercury-laden parts. Damaging these lines did, or potentially did, release mercury, PCBs and refrigerants into the atmosphere. As with the open burning violations, the public health and environmental risks associated with the solid waste violations are obviously of great concern to the Court.

IV) Maximum penalties

As noted previously, the maximum amount that may be imposed with respect to the violations are as follows: up to $10,000 per day for violations of §455B.146 (air quality violations); a maximum of $5000 per day under §455B.191(1)(waste water violations); and, the violation deemed most serious, solid waste violations under §455B.307(3), authorize the Court to impose a $5,000 per day maximum penalty. The Defendants were in continual noncompliance with the waste water and solid waste regulations for over 700 days, potentially exposing them to approximately $7,000,000 of liability. The open burning violations occurred on two discrete instances, with a maximum penalty of $20,000 for the two instances. The State DNR does not suggest that the Defendants be subjected to such draconian penalties; however, the DNR

contends that the willful and blatant violations of the administrative order (especially with respect to solid waste and air quality violations) warrants more than a *de minimis* sanction.

V) Deterrence

The Court finds that the Defendants, for a period of two years, had failed to heed the administrative order issued by the DNR. In fact, despite having previously been found liable by this Court, the Defendants continued to be in non-compliance with DNR regulations, and blatantly violated this Court's permanent injunctions. Judge Whittenburg, in her September 24th 2007 order, required the Defendants to A) permanently cease violating pertinent regulations of the State's environmental laws; B) to permanently cease appliance demanufacture, or, in the alternative, to obtain the proper permit; C) to immediately obtain a storm water permit and pollution prevention plan, or, in the alternative to properly remove and dispose of the appliances. As of the May 22nd date of the damages portion this trial, the DeVosses had failed to comply with a single one of the Court's orders, or the DNR administrative order. The Court finds that there is no sanction, short of a severe one, which will deter the Defendants conduct.

VI) Other Circumstances

Despite the continued and flagrant violations of Court and DNR orders, the Court is particularly distressed with events that occurred on May 20th 2008. DNR agents attempted to go to the DeVos property to take pictures for the proper submission of evidence. Upon seeing the DNR officer, Mr. DeVos walked into his home and returned carrying a rifle. While Mr. DeVos did not point the weapon at the agent, he did instruct the agent that, "You can leave now. Don't you ever fucking come around again." These actions clearly were intended to discourage the DNR from fulfilling their investigative duties authorized by the Legislature. Moreover, since these actions were on the eve of trial for civil penalties, there leaves the Court with the rational conclusion that Mr. DeVos was attempting to prevent the authorized gathering of evidence that this Court ordered in September 27th 2007. The displays of force, the obstruction of State officials, the noncompliance of Court and DNR orders, and the obvious disregard for the people and environment of the State of Iowa all weigh heavily against the Defendants.

C) Assessment of Liability

The Court now concludes, based on the record and evidence before it, that clearly more than *de minimis* sanctions are warranted.

The Defendants were in noncompliance with waste water violations for over 700 days, in violation of Court and DNR orders. While up to $3,500,000 may be assessed, the Court –upon the urging of the State- does not believe that the maximum is rationally related to any deterrence of the DeVos' behavior. More appropriately is to assess a maximum penalty for each of the "book end" dates of the June 7th 2006 DNR order and the May 22nd 2008 trial date. Accordingly, $10,000 for these violations is appropriate.

The Defendants also on two discrete occasions knowingly and willfully violated air quality laws, potentially endangering the health, safety and welfare of the people of Iowa. These violations occurred within a year of one another, and there is no indication that burning of mercury and PCB-laden parts ever ceased. Accordingly, to deter future episodes of open burning of these appliances and parts, the maximum as to both instances is to be imposed, for a liability of $20,000.

According to unrefuted evidence presented by the State, the Defendants had –at the time of this trial- approximately 50 appliances on the premises. The savings realized by the Defendants for their failure to properly dispose of the appliances is approximately $20 per appliance, for a sum of $1,000. Moreover, since the Defendants were engaged in appliance demanufacture, a site plan engineering was required, as was documentation of financial assurances. The bonding for financial assurances is $10,000, while a site engineering plan is $2,000. The total cost of compliance, savings realized by the DeVosses, totals $13,000.

Finally, the violation of most concern to the State, and to the Court, involves the handling and disposal of appliances such that refrigerant lines and capacitors were damaged, cut or broken. The destruction of these parts and lines resulted in the release of mercury and PCBs into the environment and threatens the health, safety and welfare of the people of Iowa. The Defendants were in noncompliance for approximately 700 days with the appropriate solid waste laws. They were given every opportunity to comply with the June 7th 2006 DNR order and the Court's September 24th 2007 permanent injunction. As of the date of trial, they had still failed to do so. While a maximum penalty of $3,500,000 may be assessed for this repeated violation, the Court is not convinced that such a burdensome penalty furthers the ends of deterrence. However, as the State argues, and the Court is convinced, the Defendants plainly require more than an insignificant penalty. The Court has frankly struggled with the appropriate penalty that is necessary in this instance, and rationally believes that a combination of approaches is warranted.

First, applying the "book end" approach used with the waste water violations, the Court finds that $10,000 –the maximum for both the June 7th 2006 and May 22nd 2008 dates- is appropriate. Further, given the repeated, willful disregard for the laws of this State, the welfare of their neighbors and the environment, the menacing of DNR agents, and the failure to heed lawful Court and agency orders, the DeVosses are further to be assessed 1% of the maximum penalty, for a period of 700 days. The 1% amount, to be added to the "book end" penalty, is $50 per day, for a period of 700 days, resulting in liability of $35,000. Thus, the total penalty assessed for solid waste disposal violations is $45,000.

CONCLUSION

The total liability of the Defendants shall be $88,000, apportioned as follows:

A) $10,000 for continuous violations of waste water regulations;

B) $20,000 for willful violations of air quality regulations;

C) $13,000 for cost of compliance savings realized by the Defendants;

D) $45,000 for continuous violations of solid waste regulations.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED:

1. All of the above;
2. The permanent injunctions imposed by the Court in its September 24th 2007 Order shall remain in effect;
3. The Defendants shall be liable for $88,000 of civil penalties as authorized under the Iowa Code and the Administrative Code;
4. The Defendants shall pay all costs associated with this proceeding;
5. The Clerk of Courts is directed to forward copies of this Ruling to counsel and parties of record.

IT IS SO ORDERED,

Signed this 13th day of August, 2008.

BY THE COURT

Hon. Jeffrey A. Neary
JUDGE, THIRD JUDICIAL DISTRICT OF IOWA

8-18-08- Rule copy sent
to Duff + Hansel + Sharon
DeVos + Lyon Co. Sheriff.
E Lyons, Clerk